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SUPREME COURT, U.S.
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No. 02-1764

IN THE

Supreme Court of the United States

SOB, INC., A MINNESOTA CORPORATION, d/b/a SUGAR DADDY'S; AMY CHENOWETH; SHANNON WIBORG; KATHRYN HASKINS; MARK VAN GELDER; and MARY CLIFFORD VAN GELDER,

Petitioners,

v.

COUNTY OF BENTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

SCOTT T. ANDERSON
Counsel of Record
AMY E. MACE
RATWIK, ROSZAK & MALONEY, P.A.
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

Attorneys for Respondent

181636

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit's decision upholding the Benton County Ordinance prohibiting public nudity is consistent with this Court's rulings in *City of Los Angeles v. Alameda Books* and *City of Erie v. Pap's A.M.*?

2. Whether the Eighth Circuit's decision refusing to enjoin the County from enforcing the public nudity ordinance by means of custodial arrest is consistent with this Court's rulings in *Lee Art Theater v. Virginia* and *Roaden v. Kentucky*?

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CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution and the Benton County Public Indecency Ordinance No. 332. *See* Pet. at 1-2; Resp't App. at 1a-5a.[1]

STATEMENT OF THE CASE AND THE FACTS

On June 5, 2001, at a regular meeting of the Benton County Board of Commissioners (hereinafter "Board"), the County Attorney for Benton County, Robert Raupp, presented a draft public nudity ordinance. Appellants' App. at A645-A646. The County Attorney referred to the U.S. Supreme Court case which upheld a public nudity ordinance (*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)) and the City of Cannon Falls public nudity ordinance which had been upheld by a Minnesota court. *Id.*

County Attorney Raupp presented a comprehensive report to the Board in May, because, as noted therein, Board members had asked him about other methods besides the county zoning ordinance for addressing potential adverse secondary effects

1. The draft public nudity ordinance included in Petitioner's App. at A51-A54 is not a copy of the Benton County Public Nudity Ordinance as it was enacted. A copy of the Ordinance is included in Respondent's App. at 1a-5a. Citations in the form "Resp't App." are to the appendix to Respondent's brief. Citations to "Pet." are to Petitioners' petition. Citations in the form "Appellants' App." are to the Appendix to the Brief of Appellants (now Petitioners) submitted to the Eighth Circuit. Citations in the form "Appellee's App." are to the Appendix to the Brief of Appellee (now Respondent) submitted to the Eighth Circuit. Respondent will provide the Court with copies of the materials cited herein (or any other parts of the record below) should the Court so request.

associated with adult uses. *Id.* at A653-A663. The Board was clearly advised that they might consider evidence of adverse secondary effects obtained either through their own local experience, or through studies conducted by other communities. *Id.*

Prior to the July 3, 2001 Board meeting, the Commissioners had before them studies from a number of communities, as well as the Minnesota Attorney General's study on the regulation of sexually oriented businesses. *Id.* at A641, A665-1021a, A1023; Appellee's App. at A4-A220.[2] Those studies indicate a vast array of potentially adverse secondary effects arising from the existence of sexually oriented businesses. For example, the Minnesota Attorney General's report concluded there was compelling evidence that sexually oriented businesses can lead to high crime rates, depression of property values, and a change in the character of a neighborhood. Appellants' App. at A1002. The report noted arrest rates underestimate the level of crime associated with such businesses because, due to the nature of such crimes and the individuals involved, many are never reported to the police. *Id.* at A1005. Similarly, the 1987 St. Paul study found the welfare of the community could be greatly affected, as the sexually oriented businesses can lead to a feeling in neighboring areas that such areas are "unsafe and undesirable" as well as frequent sex related harassment by motorists and pedestrians, and litter of a sexual nature. Appellee's App. at A26-A30. These effects lead to negative perceptions about a

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2. The Appellants' Appendix did not contain all of the studies that the Board relied upon in enacting the Ordinance. Thus, the County included the remainder of the studies that it relied upon in its Appendix. *See* Appellee's App. at A4-A220. All of the studies were included in Defendant's Exhibit 3 which was submitted to the District Court with Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order.

neighborhood or community with resulting effects on the quality of life. *Id.* at A30. Dead zones can be created due to sexually oriented business where people avoid going into them. *Id.* at A170. The studies noted adult use signage as a potential problem, not the least of which can be the exposure of minors. *Id.* at A110, A-179.

A public hearing was held on the proposed public nudity ordinance on July 3, 2001. Appellants' App. at A1022-A1034. A number of citizens spoke both in favor of and against the Ordinance. *Id.* at A1023-A1028. Numerous concerns were expressed regarding the effects of sexually oriented businesses on the community, including the harm these businesses may cause to children, as well as adults. *Id.* Citizens also submitted materials in advance of the Board meeting expressing their concerns, including a report by a private investigator, which indicated that upon visits to Petitioners' establishment, he observed dancers rub their breasts against the top of customers' heads, dancers rubbing the crotches of male patrons, and dancers rubbing their bodies (including their crotches, buttocks, and heads), up and down along the crotches of male patrons. Appellee's App. at A221-A229. Testimony of a former manager of various strip clubs was also presented, which details some of the crimes, abuse, drug usage, and other activities that go on in sexually oriented businesses. *Id.* at A230-A239.

The manager of Sugar Daddy's, Mr. Van Gelder, spoke against the Ordinance at the hearing. Appellants' App. at A1023-A1025. He contended there was no increase in crime as a result of his establishment. *Id.* at A1024. He provided to the Board a study seeking to debunk other studies that have concluded sexually oriented businesses cause negative secondary effects. *Id.* He also alleged property values had not been negatively affected in the areas surrounding sexually oriented businesses. *Id.* at A113, A1025 and Appellee's App. at A290-A292.

At the July 3, 2001 meeting, County Attorney Raupp indicated the draft ordinance contained proposed language relating to secondary effects for the Board's consideration. *Id.* He indicated the Board could adopt the proposed findings if it felt the findings were appropriate and reflected the Board's opinions. *Id.*

After considering the evidence, the Board voted to adopt Benton County Ordinance No. 332 (hereinafter "Ordinance") that prohibits public indecency and provides a misdemeanor penalty for public nudity. Resp't App. at 1a-5a. Section 2 of the Ordinance indicates that the Board finds public indecency can increase the incidents of criminal activity, including but not limited to prostitution, disorderly conduct and sexual assault; public indecency can expose children to an unhealthy and nurtureless environment; public indecency can present health concerns; and public indecency can have a potentially negative impact on the value and marketability of property. *Id.* at 1a-2a.

On July 6, 2001, Plaintiffs filed a Motion for a Temporary Injunction asserting the Ordinance was unconstitutional and asking the District Court to enjoin the County from enforcing the Ordinance. Appellants' App. at A20. The District Court denied Plaintiffs' motion. *Id.* at A1138.

On September 11, 2001, a combined hearing was held on Plaintiffs' application for a permanent injunction and a trial on the merits. Pet. at A29. The District Court ruled the Ordinance did not violate the First and Fourteenth Amendments and the Ordinance was not unconstitutionally overbroad. *Id.* at A40-A41. The court, however, ruled Plaintiffs were entitled to an injunction forbidding enforcement of the Ordinance by means of custodial arrest because such enforcement constituted an unlawful prior restraint of protected expression. *Id.* at A43-A45. Plaintiffs

appealed the District Court's decision upholding the Ordinance to the Eighth Circuit Court of Appeals. Appellants' App. at A1151. The County cross-appealed, arguing the District Court's Findings Nos. 9 and 10 were clearly erroneous and asserting the District Court erred by enjoining the County from enforcing the Ordinance by means of custodial arrest.

On January 24, 2003, the Eighth Circuit affirmed the District Court's decision that the ban on live nude dancing is constitutional. Pet. at A17. The Eighth Circuit reversed the District Court's decision that enjoined the County from enforcing the Ordinance by means of custodial arrest and ordered the District Court to vacate that injunction. *Id.* at A27.

REASONS FOR DENYING THE PETITION

1. THE EIGHTH CIRCUIT'S DECISION UPHOLDING THE VALIDITY OF THE PUBLIC NUDITY ORDINANCE IS CONSISTENT WITH THIS COURT'S DECISIONS IN *ALAMEDA BOOKS* AND *PAP'S*.

Petitioners assert the refusal of the Eighth Circuit to employ the burden-shifting standard adopted by the plurality opinion in *City of Los Angeles v. Alameda Books*, 475 U.S. 41 (2002) creates a conflict with the relevant decisions of this Court. The particular language that Petitioners rely on in the *Alameda Books* case provides as follows:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiff fails to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the

> municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda Books, 475 U.S. at 438-39. Petitioners assert they casted doubt on the County's rationale for the Ordinance, and thus, the Ordinance is not justified.

Petitioners have failed to point out that the *Alameda Books* case involved a zoning regulation whereas the *Pap's* case involved a public nudity ordinance. As the Eighth Circuit explained "zoning restrictions typically impact a broad range of adult entertainment businesses, whereas a ban on live nude dancing imposes a *de minimus* restriction on expressive conduct, while otherwise 'leaving the quantity and accessibility of speech substantially intact.'" Pet. at A15 (quoting *Alameda Books*, 122 S. Ct. at 1742 (Kennedy, J. concurring)). As the Eighth Circuit concluded in this case, no language in the *Alameda Books* case suggests the Court is changing the deference afforded to local municipalities in enacting public nudity ordinances. Pet. at A17. Nonetheless, it is clear the Eighth Circuit did not ignore the burden-shifting analysis in *Alameda Books* that Petitioners continue to stress. Rather, the Eighth Circuit concluded Petitioners failed to cast sufficient doubt on the County's rationale for the Ordinance, and thus, the burden did not shift back to the County. *Id.* ("Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the Ordinance.") A review of the information submitted by Petitioners demonstrates that the Eighth Circuit's decision that Petitioners did not cast sufficient doubt on the County's rationale for the Ordinance is consistent with this Court's opinions.

Petitioners assert that by introducing two papers written by Paul, Linz, and Shafer, they "casted serious doubts" as to the validity of the studies relied upon by the County for its conclusion that adult entertainment businesses cause adverse secondary effects. Pet. at 13. One of those papers was also introduced in the *Pap's* case. In the *Pap's* case, this Court specifically stated it did not view the Paul, Linz, and Shafer article as sufficient to cast doubt on the city's rationale for the public nudity ordinance. *Pap's*, 529 U.S. at 298 (stating the study relied on by *amicus curiae* did not cast any legitimate doubt on the Erie city council's judgment about Erie) (citing Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23) and at 300 (rejecting Justice Souter's position that the Court should ignore the city's actual experience and instead require an empirical analysis).[3]

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3. As Petitioners assert, an updated version of the Paul, Linz, and Shafer paper was submitted in the *Alameda Books* case. Clearly, the introduction of that updated paper also did not change this Court's conclusion that adult entertainment businesses cause adverse secondary effects. Other courts have similarly rejected such evidence as sufficient to rebut a municipality's conclusion regarding adverse secondary effects. *See, e.g., Nite Moves Entertainment v. City of Boise*, 153 F. Supp. 2d 1198, 1208 (D. Idaho 2001) (rejecting Dr. Linz's testimony as to adequacy and reasonableness of studies regarding adverse secondary effects, where reliance on those studies was found reasonable by Supreme Court in *Pap's*); *R.V.S. v. City of Rockford*, __ F. Supp. 2d __, Civil File No. 03-C-50048, 2003 WL 21354607 at *6 (N.D. Ill. 2003) (explaining that Dr. Linz's testimony was insufficient to cast doubt on experience of local government); *Kismet Investors v. County of Benton*, 617 N.W.2d 85, 94 (Minn. App. 2000) (explaining that issue of whether adult uses actually cause secondary effects is type of fact-finding best left to county's comparatively superior ability to amass and evaluate vast amount of data available and make predictive judgments about its own circumstances), *pet. for cert. denied*, 536 U.S. 904 (June 10, 2002).

Petitioners also assert they casted doubt on the County's rationale for the Ordinance by introducing evidence showing in the eight years of their existence, the two adult entertainment facilities in the County "have generated no more police calls or complaints of criminal activity than have other commercial establishments within the County, such as Rumor's Bar or the Conoco gas station." Pet. at 5. Although Petitioners claim to have submitted evidence from the past eight years (*id.* at 14), the evidence was limited to a one-year period. *See id.* at A80.

It is important to note Petitioners did not conduct a local study to determine the effect adult entertainment businesses have had on local crime rates. Rather, Petitioners selectively chose two local businesses and compared the police calls to those businesses with the police calls to the two adult entertainment businesses. Mr. Van Gelder's Affidavit regarding crime statistics is clearly self-serving.[4]

Petitioners' assertion that the two adult entertainment facilities "have generated no more police calls or complaints of criminal activity" than have Rumor's Bar is incorrect. Sugar Daddy's had three times more police calls than Rumor's Bar in the one-year period and only four less calls than the Conoco gas station. Pet. at A80. Contrary to Petitioners' assertion, no evidence was submitted regarding "complaints of criminal activity." Rather, Mr. Van Gelder's Affidavit is limited to police calls and does not provide any type of description as to why the police were called or the results of those calls.

Mr. Van Gelder's Affidavit does not cast legitimate doubt on the County's conclusion that adult entertainment businesses cause adverse secondary effects. Rather, the Affidavit supports

4. Petitioners did not even introduce the crime statistics they provided to the Board to the District Court.

the County's rationale for the Ordinance. The information submitted by Mr. Van Gelder shows that criminal activity is associated with Sugar Daddy's. Pet. at A80. Simply because Mr. Van Gelder was able to find one local business having four more police calls than Sugar Daddy's in a one-year period does not cast any legitimate doubt on the evidence before the County that adult entertainment businesses cause adverse secondary effects.[5]

Finally, Petitioners point to Mr. Van Gelder's analysis of property values as the last piece of evidence that they assert casted doubt on the County's rationale for the Ordinance. Petitioners' property analysis consisted of comparing property values for the area surrounding the two adult entertainment businesses in the County with the property values for the areas surrounding "D.J.'s Small Engine Service" and "Pirate's Cove." Pet. at A79. Petitioners assert the statistics indicated property values over the past seven years have increased at a higher rate around the adult entertainment establishments than around the other establishments. *Id.*

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5. Several other courts have rejected similar arguments made by other adult entertainment businesses. *See Jake's Ltd. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002), *pet. for cert. denied*, 123 S. Ct. 413 (2002) (rejecting plaintiffs' argument that police activity due to sexually oriented businesses was on par with that of local bar that did not have nude dancing and thus city's crime statistics did not support regulating adult entertainment business on basis of secondary effects); *World Wide Video of Washington v. City of Spokane*, 227 F. Supp. 2d 1143 (E.D. Wash. 2002) (upholding constitutionality of zoning ordinances regulating adult retail use establishments and concluding that such businesses had not casted direct doubt on city's rationale for ordinances, where land use planner's empirical study focused on blight, crime, and property values and did not tell entire story about adverse secondary effects of adult establishments).

Again, Petitioners did not conduct a local study regarding the effects the adult entertainment businesses have had on local property values. Rather, they selectively chose the properties with which to compare the properties surrounding the adult entertainment businesses.

The Affidavit of the County Assessor, Brian Koester, however, shows the figures produced by Mr. Van Gelder are misleading and do not establish anything regarding the effect a certain type of business may have on nearby property values. Resp't App. at 6a-10a. The County Assessor explained the materials submitted by Mr. Van Gelder were not prepared by the County Assessor's Office. *Id.* at 7a, ¶ 3. The County Assessor found numerous errors in the information submitted by Mr. Van Gelder. *Id.* ¶ 4. For example, the County Assessor noted that all of the percentage market increases in Mr. Van Gelder's submissions were not calculated pursuant to generally accepted valuation methods, and thus were incorrect and inflated. *Id.* In addition, the County Assessor explained that estimated market value and taxable market value numbers had been mixed together in Petitioners' submissions or used alternatively, which resulted in a higher inflationary factor than was correct and thus incorrect percentage market increases. *Id.* at 7a-8a, ¶ 4.

The County Assessor also explained that Mr. Van Gelder did not take into account improvements of the properties, such as unimproved properties that then had new homes built on them, which resulted in an incorrect percentage market increase. *Id.* at 8a, ¶ 5. The County Assessor also noted that Mr. Van Gelder compared lakefront properties with some off-water properties which was not an accurate comparison. *Id.* The County Assessor stated many of the entries in Petitioners' submissions

did not reflect any recent sales and the recent sales that were reflected showed an incorrect percentage increase in value. *Id.* at 8a, ¶ 6.[6]

The County Assessor noted property values could be negatively affected by other nearby situated properties in at least two ways. *Id.* ¶ 7. First, there could be an actual decrease in property values. *Id.* at 8a-9a, ¶ 7. Second, there could be an increase in value that is less than that of a comparable property not situated next to the property in question. *Id.* at 9a, ¶ 7. The County Assessor explained that to determine whether property values are negatively affected by other nearby situated properties, one would look to what are termed comparative sales, which Mr. Van Gelder's submissions did not do. *Id.*

The County Assessor also explained that whether an activity that takes place at one property negatively affects property value of other properties may take a significant amount of time before the negative effects become apparent. *Id.* ¶ 8. Negative effects may not show at all during an active market, instead not becoming apparent until the real estate market has been inactive for some time. *Id.* The County currently, and has for some time, had an extremely active real estate market. *Id.* ¶ 9.

The information Mr. Van Gelder submitted to the Board is clearly self-serving. As discussed above, the County Assessor, who is clearly more qualified in this area than Mr. Van Gelder, pointed out numerous ways in which Mr. Van Gelder's submissions were misleading and inaccurate. *Id.* at 6a-10a.

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6. For example, in regard to parcel .01432 (which was incorrectly noted as parcel .01432.06 in Mr. Van Gelder's submissions), the Assessor's records showed the property sold in April, 2000, and the percentage increase over eight-years time was actually only 30.19% instead of the 130.91% as indicated on Petitioners' submissions. Resp't App. at 8a, ¶ 6.

In addition, the County's finding regarding property values provided public indecency "can have a potentially negative impact on the value *and marketability* of property." *Id.* at 2a (emphasis added). Mr. Van Gelder's Affidavit is only related to estimated property values and does not address the marketability of properties near the adult entertainment businesses. For all of the reasons discussed above, the evidence submitted by Petitioners does not cast doubt on the County's finding that one of the adverse secondary effects caused by adult entertainment businesses is their negative effect on the value and marketability of nearby properties.

As the Eighth Circuit correctly pointed out, Petitioners' submissions only addressed police calls and property values, whereas the findings of the Ordinance also provide public indecency can expose children to an unhealthy and nurtureless environment and can present health concerns. *Id.* Petitioners have not submitted any information that would rebut the County's findings that adult entertainment businesses cause these adverse secondary effects. The County's findings are supported by the numerous studies relied on by the County. Appellants' App. at A641, A665-1021a, A1023; Appellee's App. at A4-A220.

The County Board considered approximately seventeen reports that concluded adult entertainment businesses cause adverse secondary effects. *Id.* Many of those reports included case studies from a number of communities. *Id.* On the other hand, the County had the self-serving affidavit of the manager of Sugar Daddy's that asserted Sugar Daddy's had less police calls than one other business and local adult entertainment businesses did not adversely affect property values. If all that were required for sexually oriented businesses to defeat public nudity ordinances was for the businesses to find one business with more police calls than the adult entertainment businesses and to complete a

misleading analysis of property values, then most likely every sexually orientated business would be successful at defeating public nudity ordinances. Clearly, this result is not what the Supreme Court envisioned by stating if plaintiffs cast direct doubt on the municipality's rationale for the ordinance, then the burden shifts back to the municipality. *Alameda Books*, 475 U.S. at 438-39.[7] This Court has repeatedly reasoned that the governing body of the municipality is in the better position than the courts to gather and evaluate information on local problems. *Id.* at 440; *Pap's*, 529 U.S. at 297-98.

In *Pap's*, this Court upheld a public nudity ordinance, where the city did not offer any evidence of secondary effects within the city, and there was no evidence the city council considered studies of secondary effects in any other jurisdiction. 529 U.S. at 297. Rather, the plurality in the *Pap's* case ruled that the city council could take legislative notice of the secondary effects noted in court opinions and could rely upon the own opinions of council members. *Id.* at 297-301.

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7. Petitioners also assert that the Eighth Circuit's decision is directly contrary to the decision in *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *pet. for cert. denied*, 536 U.S. 904 (2002). Petitioners assert that the *Flanigan's* decision holds that where local evidence plainly indicated a complete absence of adverse secondary effects, it was impermissible for the county to rely on virtually the same dubious foreign studies relied upon by the County in this case. Pet. at 14 n.4. The *Flanigan's* case, however, involved an ordinance which banned nude dancing in establishments licensed to sell liquor, rather than a public nudity ordinance. The *Flanigan's* court stated "*[t]o be sure, Defendants may respond by enacting a ban on all public nudity; the Supreme Court has upheld that.*" *Id.* at 987 (emphasis added). Thus, it appears that the *Flanigan's* court would have decided the issue differently if the ordinance was a public nudity ordinance. The Eighth Circuit's decision is not directly contrary to the *Flanigan's* decision.

Unlike the *Pap's* case, in this case, the County considered numerous studies that concluded adult entertainment businesses cause adverse secondary effects. In addition, the County considered materials submitted by citizens in advance of the Board meeting expressing their concerns, including a report by a private investigator, which indicated upon visits to Petitioners' establishment, he observed dancers rub their breasts against the top of customers' heads, dancers rubbing the crotches of male patrons, and dancers rubbing their bodies (including their crotches, buttocks, and heads), up and down along the crotches of male patrons. Appellee's App. at A221-A229. Testimony of a former manager of various strip clubs was also presented, which details some of the crimes, abuse, drug usage, and other activities that go on in sexually oriented businesses. *Id.* at A230-A239. It is clear that the record before the County Board in this case provided more support for the public nudity ordinance than the record presented to this Court in *Pap's*.

For all of the reasons discussed above, the Eighth Circuit's upholding of the Ordinance was entirely consistent with this Court's holdings in the *Pap's* and *Alameda* cases, and thus, this Court should deny the petition for writ of certiorari.

2. THE EIGHTH CIRCUIT'S DECISION ON THE PRIOR RESTRAINT ISSUE IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

Petitioners assert *if* a dancer is arrested for violating the Ordinance, the arrest will be an unlawful prior restraint on speech. The Eighth Circuit properly pointed out that typically, a federal court will not enjoin enforcement of a state criminal law, even though unconstitutional. Pet. at A24. The court explained "'[t]o justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary

in order to afford adequate protection of constitutional rights.'" *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 712 (1977)). As the Eighth Circuit concluded, Petitioners have failed to demonstrate that exceptional circumstances exist in this case that warrant pre-enforcement intrusion by a federal court of equity. Pet. at A24. The Eighth Circuit correctly concluded any prior restraint issues that may arise should the County elect to enforce the Ordinance by means of custodial arrest were better left for the state courts to resolve on a specific factual record. *Id.* at A27.

Petitioners have asserted the Eighth Circuit's decision is directly contrary to this Court's decisions on prior restraint. In support of that assertion, Petitioners cite two cases, *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968) and *Roaden v. Kentucky*, 413 U.S. 496 (1973). Both of those cases are easily distinguishable. First, both of those cases involved seizures of films based on obscenity statutes, rather than arrests based on public nudity ordinances. Second, both of those cases involved seizures related to suppressing speech.

In the *Lee Art Theatre* case, a justice of the peace issued a search warrant to seize an allegedly obscene movie based solely on a police officer's affidavit that referred only to the title of the movies and stated the officer had determined from personal observation of the movies and from the billboard in front of the theatre that the movies were obscene. 392 U.S. at 636. The Court explained it had previously ruled that in connection with the seizure of allegedly obscene books, a warrant "issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered * * * obscene" was an unconstitutional seizure. *Id.* at 637 (quoting *Marcus v. Search Warrants of Property at 104 East Tenth St.*, 367 U.S. 717, 731-32 (1961)). The Court

reasoned the procedure under which the warrant was issued fell short of constitutional requirements because there was no inquiry by the justice of the peace into the factual basis for the officer's conclusions. *Id.*

In the *Roaden* case, the issue was whether the seizure of an allegedly obscene film, contemporaneous with and as an incident to an arrest for the public exhibition of the film, could be accomplished without a warrant. 413 U.S. at 497. The Court held such a seizure was an unconstitutional prior restraint. *Id.* at 504. The Court explained that seizing a film that was being shown to the general public presented essentially the same restraint as seizure of books and that such action without a constitutionally sufficient warrant was a prior restraint. *Id.* The Court emphasized the warrantless seizure of books and films constituted a prior restraint because the basis for the seizure was the ideas that the books and films contained. *Id.*

Petitioners assert the custodial arrest of a nude dancer for violation of the Ordinance would function in exactly the same way a warrantless seizure of a film does: the seizure would effectively restrain the dancer's continued right of expression. Pet. at 18-19. Unlike a film, however, which if seized can no longer be shown, Petitioners do not suggest that the arrest of a dancer would be followed by extended custody. Thus, as the Eighth Circuit recognized and Petitioners do not contest, the only later performances likely to be restrained are additional live nude dances that night.

In addition, unlike the *Lee Art Theatre* and *Roaden* cases where the seizures were aimed at suppressing speech, a custodial arrest based on the Ordinance would not be not aimed at suppressing the erotic speech of the dancer. Rather, the arrest of a dancer would be based on the dancer's violation of a criminal

ordinance. The arrest would not be aimed at suppressing any ideas contained in the dance; rather, the action would be aimed at illegal conduct. As this Court has stated, requiring dancers to wear pasties and G-strings does not deprive the dancer of whatever erotic message it conveys. *Pap's*, 529 U.S. at 294.

The Eighth Circuit reasoned that the doctrine of prior restraint is only marginally involved here. Prior restraint is used to describe "orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotations omitted). A custodial arrest of a dancer after the dancer's performance would not forbid the dancer from engaging in expressive activities in the future nor would the arrest require her to obtain prior approval for any expressive activities. Rather, an arrest would be for past conduct that violates a criminal ordinance, not for any claimed future conduct. Petitioners have failed to recognize this distinction. *See id.* (explaining that adult entertainment business that argued that forfeiture of assets constituted prior restraint was stretching term "prior restraint" well beyond limits established by Supreme Court cases); *Alexis, Inc. v. Pinellas County*, 194 F. Supp. 2d 1336 (M.D. Fla. 2002) (officers' actions in arresting dancers at adult entertainment businesses for whom there was probable cause for arrest was not impermissible prior restraint); *Kew v. Senter*, 416 F. Supp. 1101, 1106 (N.D. Tex. 1976) (concluding that arrest of dancer after she performed was not prior restraint because dancer could post bail and "resume her 'expression' as quickly as logistics permit").

Petitioners have also completely ignored the cases most directly on point in regard to the custodial arrest issue. In *Furfaro v. City of Seattle*, 27 P.3d 1160 (Wash. 2001), *pet. for cert. denied*, 536 U.S. 922 (2002), exotic dancers and the owner of

an adult entertainment business sued the City of Seattle, arguing the warrantless arrests of the dancers under a city ordinance prohibiting stage dancers from sexual self-touching during a performance were a prior restraint. 27 P.3d at 1162-63. The court disagreed holding warrantless arrests of the nude dancers were not prior restraints. *Id.* at 1166.

The court reasoned live performances were not entitled to the same protection under the First Amendment as that afforded to books and film. *Id.* at 1166. The court, relying on the *Pap's* decision, explained that nude dancing only receives minimal protection under the First Amendment. *Id.* The court reasoned such a minimal level of protection was insufficient to support the contention that a warrant was required by the First and Fourth Amendments even though no federal or Washington state court had recognized such a requirement. *Id.*

In the *Furfaro* case, both parties petitioned this Court for a writ of certiorari. This Court denied both petitions on June 17, 2002. 536 U.S. 922. Similarly, this Court should deny Petitioners' petition because the Eighth Circuit's decision is not in conflict with this Court's decisions.

The aspect of the Eighth Circuit's ruling with which Petitioners take great exception is the Eighth Circuit's comment that "an arresting officer will know to a virtual certainty whether a particular live nude performance at Sugar Daddy's falls within the artistic exception." Pet. at A27. Petitioners, relying on materials that are not part of the record, assert that two dancers who were charged with violating the Ordinance were found not guilty by juries based on the artistic exception. Thus, Petitioners assert the County must be enjoined from enforcing the Ordinance by means of custodial arrest.

First, the materials upon which Petitioners rely for the assertion that two juries returned not guilty verdicts based on the artistic exception should not be considered by this Court. Those materials include criminal complaints against two dancers, copies of two not guilty verdicts, and a newspaper article. *See* Pet. at A147-A168. Those materials were not considered by the Eighth Circuit when the court issued its decision in this matter. Petitioners assert that this Court can take judicial notice of proceedings in other courts. *Id.* at 21 n.6. The court documents, however, do not provide the rationale for the juries' decision. *Id.* at A164-A165. Rather, Petitioners rely on a newspaper article for the assertion that the juries returned verdicts of not guilty based on the artistic exception. Unlike court proceedings, courts do not take judicial notice of statements made in newspaper articles. Thus, this Court should reject Petitioners' arguments based on documents that were never considered by the Eighth Circuit.

Even assuming those documents were properly before this Court, however, Petitioners' argument misses the point. Simply because two juries have determined reasonable doubt existed as to whether the dancers violated the Ordinance does not indicate the officer lacked enough objective information to issue a citation for a violation of the Ordinance. Petitioners fail to acknowledge the difference between the standard for citing someone for violating the Ordinance and the standard that applies for a conviction under the Ordinance.

Since the Eighth Circuit's decision on the prior restraint issue is not in conflict with this Court's decisions, this Court should deny the petition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

SCOTT T. ANDERSON
Counsel of Record
AMY E. MACE
RATWIK, ROSZAK & MALONEY, P.A.
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

Attorneys for Respondent